No. 14,743

United States
COURT OF APPEALS
for the Ninth Circuit

HERBERT SIMPSON,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the District of Oregon

PETITION FOR REHEARING

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POINTS ON PETITION FOR REHEARING

INDEX OF AUTHORITIES

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When appellant suggested to his counsel before last Christmas that he wished to visit his father in another State and that request be made of the Court for permission to leave the State of Oregon for such visit, the writer told appellant that surely by Christmas time a decision would be rendered acquitting him and, therefore, such request would not be necessary. The writer's erroneous statement was made upon the conviction that the appellate court could not write an opinion sustaining the defendant's conviction and answer satisfactorily

to itself each of the grounds set forth in the appeal. The writer had forgotten that the Court could write an opinion without answering the points raised as grounds for appeal. The writer requests the Court for a rehearing because the points raised on appeal were not only made in good faith but on sufficient foundation of law or principle or both so that a careful reexamination of them with the view of writing an answer to them will lead to a reversal on one or more of the grounds set forth.

In view of the fact that appellant firmly believes that the Court's opinion in this case is in direct conflict with the decision of another panel of this Court in the Fagerhaugh, Jackins and Starkovich cases request is made that a rehearing be granted and that on such rehearing the Court sit en banc.

The Court in its opinion does reach three or four of the points that were argued on appeal. One is that it is not necessary for the indictment to allege "willful," "unlawful" or "wrongful" refusal to answer questions. Appellant asks the Court for a rehearing on this point so that the Court may reconsider the numerous authorities cited by appellant in his brief which, prior to this decision have held that an indictment without "willful" or "unlawful" is fatally defective. A refusal to answer need not necessarily be wrongful or unlawful. A refusal to return property to an owner may not be unlawful—the possessor may have a valid lease from the owner.

The Court sites with approval the case of Barenblatt vs. U. S., No. 13327, U. S. Circuit Court of Appeals, Dist. of Columbia, Jan. 3, 1957. The indictment in that

case read "unlawfully refused to answer." In its opinion on page 3 the Court said "The indictment charges that these questions 'were pertinent to the question then under inquiry', and that the subcommittee was conducting hearings at the time pursuant to its enabling resolution." Residence was not one of the questions on which the indictment was based if such question was asked. On page 7 of its opinion the Court stated, ". . . appellant was asked several times if the grounds for his objections encompassed the Fifth Amendment privilege against self-incrimination, which he stated they did not." On page 14 the Court quotes from Quinn v. U. S., 349 U.S. at 160-161, "But the power to investigate, broad as it may be, is also subject to recognized limitations. It cannot be used to inquire into private affairs unrelated to a valid legislative purpose."

The Court also cites Sachar v. U. S., No. 13302, U. S. Circuit of Appeals, D. C., Jan. 3, 1957. In that case the language of the indictment does not appear but the Court states that the indictment need not allege "willful" refusal to answer and cites Deutch v. U. S., 235 F. 2d 853, as its authority. The indictment in the Deutch case does allege that refusal to answer to be "unlawful," which is more inclusive than "willful" and even more necessary for a valid indictment. Also, in the Sachar case residence was not one of the questions involved and Sachar did not assert his right under the Fifth Amendment.

If new law is to be made against the vast number of previously adjudicated cases, it should be to protect the

individual against the powerful State and not to deprive him of rights which Courts have so frequently said he has.

The Court apparently erred in substituting its opinion of whether an isolated question would lead to an incriminating answer as against the justified fear of a witness in a hostile setting when confronted with a cluster of questions. The Court also erred in failing to hold that identifying questions—aimed at identifying a witness as a Communist—justify the exercise of the privilege. Either pertinency is a proper issue for the jury to try or the evidence on pertinency as well as evidence involving the privilege should not have been presented to the jury.

It is true that in Sinclair vs. U. S., 279 U.S. 263, the Court stated that pertinence was a matter of law for the Court to decide. That was in 1929 and indication is that there was no contrary evidence. In U. S. vs. Orman, 207 F. 2d 148, 3d Circ., decided on Sept. 18, 1953, the Court says on page 155 that in the Sinclair case the Supreme Court explained that the "question of pertinency was rightly decided by the court as one of law." The Circuit Court then points out with emphasis on page 156 that the Supreme Court further said "It did not depend upon the probative value of evidence." The Circuit Court then goes on to say on page 156:

> "In the instant case, however, evidence aliunde was introduced to prove pertinency. The weight and probative value of this evidence was for the jury, particularly since pertinency was an element of the criminal offense. We conclude that in this situation the trial court, taking the evidence as true,

> retains the power to decide that pertinency has not been established. But if the court concludes that pertinency has been proven, it is proper for it so to rule and then to submit the question and the evidence to the jury under appropriate instructions. This in substance is what the court below did."

In Keeney vs. U. S., 218 F. 2d 843, D.C., decided on Aug. 26, 1954, each of the three judges felt bound by the language in the Sinclair case but two of the judges further stated that pertinency should be a jury question. Judge Edgerton said on page 845:

> "If the Supreme Court had not ruled otherwise, we should have thought this a matter for the jury to decide, like any other element of the crime with which the appellant was charged."

Judge Prettyman said on page 849:

> "Were it not for the unequivocal holding of the Supreme Court in the Sinclair case, I would think that, since pertinency is an element of this offense, it, like all other such elements, would be for the jury. Since the Supreme Court holds the issue is not for the jury, I agree that evidence which is not relevant to the issues before the jury and which is highly prejudicial to the accused on those issues, ought not be heard by the jury."

Since pertinency is an integral part of the crime as set forth in the act the right to trial by jury on that issue is guaranteed by the Sixth Amendment to the Constitution. The proper interpretation of the Sinclair case appears in the Orman case and under that interpretation appellant was entitled to and should have been granted a jury trial on that issue.

However, if the trial court felt bound to try the issue of pertinency and not to submit it to the jury,

then all of the testimony in the case on either pertinency or privilege should have been excluded from the jury as it was clearly and highly prejudicial. Therefore, either under the interpretation of the Orman or Keeney cases, there was error in the record entitling appellant to a new trial. Appellant asks for a rehearing to better amplify and present this point.

The Court apparently failed to give full consideration to the most recent and controlling cases. Let us consider U. S. v. Trock, 232 F. 2d 839, decided April 9, 1956.

This is the latest case upon which the United States Supreme Court has expressed itself on the issue involved in the instant case. Defendant Trock refused to answer eleven questions before the grand jury, one of which was, "Can you type?" Trock was taken before the Court and asked how he could incriminate himself by answering each of the eleven questions and Trock refused to state. The District Court convicted him of contempt and the Circuit Court of Appeals affirmed. The Circuit Court said on page 841:

> "The defendant contends that the entire setting of the examination must be considered by the court, and that where it can be observed that the refusal to answer is not capricious, and where there is some basis for apprehension on the part of the witness, the court may not substitute its judgment for that of the witness. Defendant argues that the court in interpreting the refusal to answer need not base it upon a positive showing of incrimination.
>
> "Nevertheless, in appraisal of these eleven questions, when viewed independently each one is certainly free of any criminal suggestion."

The Circuit Court in that case did almost exactly what this Circuit Court did in this case. It said on page 842 of its opinion:

> "Applying then the test suggested in Hoffman v. United States, supra, to the facts of this case, it is not possible to find the presence of such a chain as is indicated in the Supreme Court opinion. There is no showing that the questions asked will 'link' the witness with any criminal activity."

That Court further said on page 843:

> "It has not yet been said by the Supreme Court that questions innocuous in themselves in a 'setting' or chain, such as is revealed in the record before us, would justify the witness in refusing to comply with the court order.
>
> "Should the witness decide to comply with the court order, in such event, if a second run of questions were propounded based on such answers as the witness might give to the foregoing innocuous questions, and were such second run questions to present a 'hot pursuit,' the time would then have arrived for a valid claim of immunity. But as the matter now stands, to quote Judge Swan, 'his persistence in claiming privilege is premature.' "

Said the United States Supreme Court on June 11, 1956, as appears in 351 U.S. 976:

> "No. 915. Trock v. United States. On petition for writ of certiorari to the United States Court of Appeals for the Second Circuit. Per Curiam: The petition for writ of certiorari is granted and the judgment is reversed. Hoffman v. United States, 341 U.S. 479.

If the Court feels bound by the Sinclair case in depriving appellant of a jury trial on the issue of pertinency it should most certainly be bound by the Trock case in allowing the claim of privilege.

As was stated in the comparatively recent case of United States vs. Gordon, 236 F. 2d 916, 2d Circuit, Sept. 12, 1956, on page 918:

> "The latest shaft of light from that source, in the direction of a case like this, is Trock v. United States, 351 U.S. 976, 76 S. Ct. 1048. There, in a Per Curiam, reversing, without opinion, this court's decision in 2 Cir., 232 F. 2d 839, the Supreme Court cited but one case, Hoffman v. United States, 341 U.S. 479, 71 S. Ct. 814, 95 L. Ed. 1118. In Hoffman, the Court said that the privilege is available unless it is 'perfectly clear' that the witness is mistaken and that the answer 'cannot possibly' tend to incriminate. The government contends that the facts in Hoffman were substantially unlike those here. But the same could have been said of the facts in Trock.
>
> "Indeed a majority of a panel of this court said just that in United States v. Trock, 2 Circ., 232 F. 2d at pages 842-843. (Footnote on page 919)."

Standing alone, the six questions that Gordon refused to answer were quite innocuous. The first question was "Do you pay dues?", certainly in and of itself no more ominous that "Where do you live?" The court, speaking through Judge Frank, says on page 920:

> "The government argues that answers at least to some of the questions, when taken singly, are remote from any tendency to incriminate. Even so assuming arguendo, we reject that argument for these reasons: The questions together form such a cluster as to interrelated matters that to separate out any one of them, treating it as if it stood alone, would be to artificialize the actualities. Moreover, although that same situation existed in Trock's case, the Supreme Court did not deal with any one of the questions singly but sustained the privilege as to all. This court's opinion in United States v. Cur-

cio, 2 Cir., 1956, 234 F. 2d 470, is distinguishable on its facts; besides, that opinion was uttered before the Supreme Court's decision in Trock."

The setting, upon which our appellate courts have placed so much importance in such cases was described by the prosecution's principal and only witness, Mr. Kunzig, the committee's ex counsel. See Tr. of Proc. pages 87 and 88. The regalia of radio, television and newspaper reporters was there in full force. Appellant objected to being televised and the camera during his testimony was directed to other persons in the courtroom.

The setting included testimony both prior to and after appellant's testimony wherein so-called friendly witnesses testified that appellant was a communist. The cluster of 17 questions asked of appellant included the following (Tr. of Proc. pages 83, 84):

"Q. Were you ever chairman of the finance committee of the Communist Party for the State of Oregon?

Q. Were you ever chairman of the finance committee of the Communist Party for the City of Portland?

Q. Now isn't it a fact, Mr. Simpson, that you have been in the Communist Party for fifteen years and that this very moment as you sit before this Committee of your Congress that you are a member of the State Committee of the Communist Party of Oregon?"

Mr. Kunzig testified (Tr. of Proc. page 80):

"Then the testimony came of these two specific witnesses, also in public testimony, saying, as I recall—and the record would show—that they knew he had been a Communist."

Following is testimony from page 81 of the Tr. of Proc.:

"Q. Mr. Kunzig, will you please confine your answer to the following question: Was it not the purpose of the Committee in subpoenaing Mr. Simpson to inquire as to whether or not he was a Communist.?

A. That would have only been one small purpose of the Committee.

Q. That was one of the purposes of the Committee was it not?

A. It would be one of the purposes to find out whether he was a Communist."

Mr. Kunzig testified (Tr. of Proc. page 48):

" . . . But the Committee had information that we could get information under oath about Communist activities from men such as the witness here today—the defendant here today, Mr. Simpson—from men such as Mr. Owen, and others. Mr. Owen chose to answer all the questions and told everything he knew about the Communist conspiracy, and Mr. Simpson chose not to answer the questions."

Tr. of Proc. page 23 shows the following testimony of Mr. Kunzig:

"Mr. Carney: Q. We are asking in this question specifically what was the purpose of the inquiry in Portland.

A. Well, in general, as I said before, it was to investigate subversive and Communist activities in this area. I don't know how I could be very much more specific than that.

A. The Committee was interested, sir, in seeing whether there were any subversive activities, for example in connection with labor unions, in connection with education as such. . . ."

And on page 24 of Tr. of Proc. and running into page 25:

"Q. I will ask you whether the Committee had before it any information of this character you just testified to regarding the defendant Herbert Simpson.

Mr. Lenske: I object to that, your Honor. . . .

The Court: Objection overruled. Go ahead and answer.

A. Yes, sir. The Committee was in possession of confidential information that Mr. Simpson had knowledge, extensive knowledge, of Communist activities in this area, and . . . We also were interested in hearing what Mr. Simpson had to say, because we had information that Mr. Simpson had been for some time in association with suspected Communists in this area; that he knew them, he knew their activities. . . . In connection therewith we had information, confidential information, that Mr. Simpson was a member of the Communist Party. That was borne out, that information, by sworn public testimony right in this building when we were here, where a Mr. Canon said—I have forgotten the name of the other witness—Mr. Owen—these two gentlemen both testified under oath that they knew or had information that the defendant here today, Mr. Simpson, had been a member of the Communist party and I believe, if I recall correctly, even on the State Central Committee of the Communist Party here in Oregon."

On pages 20 and 21 of Tr. of Proc. Mr. Kunzig testified:

"Mr. Carney: Q. What was the purpose of the hearing at Portland, Oregon?

Mr. Lenske: . . . That is objected to. . . .

The Court: Objection overruled. . . .

A. The Chairman, Harold H. Velde made an opening statement which I cannot quote verbatim.

It is in a public record. I don't know it by heart, but in general, from my own knowledge, the purpose of our hearing in Portland was to investigate in general subversive activities or Communist activities as they may exist in this part of the United States."

From Mr. Kunzig's testimony on pages 33 and 34:

"Mr. Carney: Q. What was the purpose of the inquiry of Mr. Herbert Simpson as to his residence?

A. We asked that question, sir, as we always do, to fix the identity of the witness. It is very important for the Committee to know who the witness is that is sitting before it. We may think that we know, but as happened very recently in Washington before another committee, just in the last few months, by the questions they brought out that the wrong man was sitting before the committee. We always ask for identification purposes that question, sir."

Following is some of Mr. Kunzig's testimony on pages 85 and 86:

"Mr. Lenske: Q. Now, after you inquired the name, would you make inquiry as to identifying questions further about the individual?

A. Always; as I have explained earlier today, the Committee desires to have clear identification of the person; where he lives, his education, and so forth and so on.

Q. Those are asked as identifying questions?

A. That is certainly one of the major purposes.

Q. Does that mean that there might be another Herbert Simpson . . . and your purpose is to identify this person through these means as that particular Communist and not another person?

A. Let me answer that this way: That many is the time—to use the name Herbert Simpson taken hypothetically—many is the time there turns out

to be five Herbert Simpsons in Portland, and we get telephone calls from the other four saying, 'Wait a minute. I am not the one that is in the Communist Party.' "

Mr. Kunzig's testimony on pages 35 and 36 of Tr. of Proc.:

"Mr. Carney: Q. I will ask you what was the purpose of the inquiry of the defendant as regarding these questions as to his education?

A. That question is almost always asked, sir, because the Committee is very interested in knowing the type of person that is testifying before it, the background of that person, and particularly the education. In other words, when the Committee is possessed of information that a person who is a witness himself has information about Communism or, as in this case, that the witness was actually a member of the Communist Party, then the Committee is greatly interested in knowing what type of person becomes a member of the Communist Party and is active in Communist affairs.

Mr. Carney: Q. I will ask you what was the purpose of the inquiry as to whether Herbert Simpson had been in the Armed Force of the United States?

A. Well, I am sure it is very clear that the Committee is interested, perhaps more than anything else, in the question as to whether there is any infiltration of Communism in our Armed Forces. That is of tremendous importance. So we asked Mr. Simpson as to whether he had ever been in the Armed Forces of the United States. We had information that he had been a member of the Communist Party, and since there was sworn testimony that he had been a member of the Communist Party, we wished to find out and inquire whether he was in the Armed Forces of the United States, perhaps while he was a member of the Communist Party, at any time."

Clearly the testimony in the instant case merits rehearing and reconsideration en banc in the light of the Starkovich, Gordon and Trock cases.

Respectfully submitted,

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